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Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered:*** **09/05/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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PUBLIC PROSECUTION SERVICE

v

SEAN PEARSON

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DEENY LJ

[1] The court has before it today an application on Notice of Motion from the Public Prosecution Service (PPS) for an order pursuant to Order 61 Rule 4 of the Rules of the Court of Judicature and Article 146(7) of the Magistrates' Courts (Northern Ireland) 1981 to direct District Judge (Magistrates' Court) Kelly to state a case for the opinion of the Court of Appeal in respect of a decision made by the District Judge on 13 November 2018. This application is grounded on an affidavit of Mr Dominic McAuley on behalf of the applicant.

[2] The facts of the matter have been helpfully summarised in the written submissions of Mr Philip Henry who acted for the PPS in this matter before this court although not before the court below. The original accused is one Sean Pearson and he was prosecuted for offences of disorderly behaviour and resisting the police when they sought to arrest him. The hearing of those charges was before District Judge Kelly at Omagh Magistrates' Court on 13 November 2018 when he was acquitted to all charges. The evidence before the court was in fact agreed in that those defending Mr Pearson agreed the prosecution evidence and the prosecution accepted in evidence two photographs which the defence had obtained of signs at the location of the incident. The location of the incident was the car park at the Asda store in Omagh and those signs described the car park as private property. To be guilty of the two offences the District Judge found, and this is not in dispute, that the disorderly behaviour should have taken place in a public place pursuant to the relevant definition under the Order to which I may advert and if it was not in a public place then he was not unlawfully resisting police when they sought to arrest him. There was an incident where his father had pulled in to the car park of the supermarket, off the public road, and the defendant in the course of an exchange

began shouting offensive language at a police officer in front of members of the public including children.

[3] The issue then arose following the acquittal by the District Judge in the Magistrates' Court of Mr Pearson as to the correctness of her decision on a point of law and the point of law which the PPS wish to test was whether or not she was right in law in effectively finding that the car park at the store was not a public place. The relevant provision is to be found at Article 18 of the Public Order (NI) Order 1987 and reads as follows:

> "**Riotous or disorderly behaviour in public place**
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> 18.—(1) A person who in any public place uses—
>
> (a) . . . disorderly behaviour; or
>
> (b) behaviour whereby a breach of the peace is likely to be occasioned,
>
> shall be guilty of an offence."

Public place is defined in the same Order at Article 2 as:

> "public place" means any street, road or highway and any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission."

[4] Mr Henry said from the Bar that while there were a number of cases in England and Wales on this point their definition of a public place was slightly different and in any event the matter had not been the subject of decision in this jurisdiction. There was a relevant decision in *R v McClure* [2007] NICA 31 but that was relating to the curtilage of a dwelling house and not a public car park.

[5] Now as I have said the hearing was on 13 November. An application for Case Stated was served properly on 21 November but the learned District Judge directed a reply be sent which was received on 27 November refusing to state a case because the application was not properly made and was defective. A further email of 30 November from the District Judge or sent on her behalf or forwarded on her behalf, objected to the recitation of facts in the application made by the PPS and concluded or asserted that this rendered the application void. It can be seen that by 27 November 14 days had elapsed from the hearing of the matter and by the time the PPS might have responded therefore they were out of time for making an application so it was necessary for them to stand over their earlier application, I say that on foot of the line of cases relied on by the District Judge and her citation of *Pigs*

Marketing Board (NI) v Redmond [1978] NI 73; *Dolan v O'Hare* [1975] NI 125 and *DPP v Harris* [2007] NICA 51. The Court of Appeal has held these time limits to be strict.

[6] The PPS then brought this application, as I have said. When it was initially reviewed before me it was suggested that there was no opposition to it. Given the earlier emails I queried this and further instructions were taken and it transpired that there had been some breakdown in communication and the District Judge did wish to oppose this application requiring her to state a case and the Departmental Solicitor's Office then instructed Ms Cheshire to appear on her behalf. The court directed that there should either be a statement from the judge and/or written submissions. The learned judge and Ms Cheshire settled on a reply by way of an affidavit sworn by the District Judge. I make it clear that the court had not directed the judge to swear an affidavit but in fact this was on the run of the case a sensible course to take and supported the attractive argument which Ms Cheshire made on behalf of the District Judge.

[7] The points made by the District Judge were in effect threefold and I will seek to outline them at this point in time. Rule 158 of the Magistrates' Courts Rules (Northern Ireland) 1984 sets out the requirements of a written application to a District Judge to state a case:

> "158. A written application under Article 146 of the Order for a case to be stated for the opinion of the court of appeal shall-
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> (a) specify the point of law involved in the determination by the magistrates' court of the proceedings or any issue as to its jurisdiction; and
>
> (b) be prepared and signed by the appellant or his solicitor or counsel and contain his address or that of his solicitor."

[8] The judge complained that the application of the PPS dated 19 November set out the facts of the matter in 10 paragraphs before the 11th paragraph setting out the point of law and she objected to that and considered that rendered the application defective and she posed the rhetorical question in her affidavit as to whether it was then deprived of any validity. She went on as follows at paragraph 5 of the affidavit which out of caution I should quote in its entirety:

> "The final paragraph of the purported application is the closest thing that could be described as a point of law, and it is misconceived. The original wording assumes that I found the car park was not a public place 'because it was agreed defence evidence in the form of photographs stating, inter alia, that the locus was private

> property'. This is untrue. I did not make such a finding. Having been furnished with photographs showing signs clearly describing the locus as private property, I asked the representative from the PPS whether he wished to call any evidence as to the nature of the locus. He declined to do so. As a result and having specific regard to paragraph 10 of the judgment in *PPS v McClure* [2007] NICA 31 I determined that I did not have before me any evidence that would prove the locus beyond reasonable doubt to have been a public place. A recitation of facts (which are not accepted) followed by misrepresentation of a ruling is not a valid application. I could not therefore find a point of law on which to state the case."

[9] Mr Henry, on behalf of the PPS, submitted written submissions in response. I have considered those and I have considered the oral submissions. Mr Patton of counsel appeared for Mr Pearson but elected not to make any submissions.

[10] The statutory provision at the heart of the matter is Article 146 of the Magistrates' Court Order 1981. Paragraph (1) of that reads as follows:

> "146.—(1) Any party to a summary proceeding dissatisfied with any decision of the court upon any point of law involved in the determination of the proceeding or of any issue as to its jurisdiction may apply to the court to state a case setting forth the relevant facts and the grounds of such determination for the opinion of the Court of Appeal."

[11] Pausing there that really addresses the first of the three points which troubled the District Judge and I propose to deal with that now. I am inclined to accept the argument of Ms Cheshire that the setting forth of relevant facts and the grounds of determination are matters for the judge. For them to be matters for the person seeking the case stated there should really have been a comma after the word 'case'. That is reinforced by the absence in the Rules at 158-160 to directions for how the facts might be set out.

[12] To return to the statute at paragraph 4:

> "(4) If the Magistrates' Court is of the opinion that an application under this article is frivolous, but not otherwise, it may, subject to paragraph 5, refuse to state a case, and, if the applicant so requires, shall give him a certificate stating that the application has been refused.

> (5) The court shall not refuse to state a case if the application is made by or under the direction of the Attorney General."

Paragraph 7 provides for what is happening here, namely an application to a judge of the Court of Appeal for an order directing the Magistrate to state a case.

[13] To return therefore to sub-paragraph (5) Mr Henry raised this morning the issue as to the relationship between the Director of Public Prosecutions (DPP) and the Attorney General. There appears to be no amendment of the provisions to say that the DPP stands for the Attorney General in these matters since the alteration in the statutory provisions emphasising the independence of the DPP from the Attorney General. There was no direction, in fact, from the Attorney General here. Therefore, this case is not a 146(5) case but I think there is some support for the case of the PPS in that it is the intention of Parliament and has been apparently since the 19th Century that the law officers of the Crown should be entitled to a case stated as of right. The DPP stands for prosecution purposes in the feet effectively of the Attorney General, so there is some analogous support for the position of the PPS.

[14] The key point is therefore Article 146(4): if the Magistrates' Court is of an opinion that an application under this article is frivolous, but not otherwise, it may refuse to state a case subject to this court. It is important to bear in mind that the word frivolous here has been the subject of judicial consideration and while its definition, for example, in Chambers Dictionary is 'trifling or silly' it does not have that meaning in this statutory provision. Mr Valentine in his commentary on the 1981 Order helpfully cites the decision of the Court of Appeal in Northern Ireland in *McClenaghan v Keenan* [2000] NIJB 135. In that case the judgment was given by Carswell LCJ and it dealt with a refusal by a Resident Magistrate in the circumstances set out in the judgment to state a case when he dismissed a prosecution as brought out of time. I think it safest for me to quote in extenso from the judgment of the Chief Justice which as is very often the case is of great assistance to the court in addressing issues which have arisen. At page 110 Carswell LJ said as follows:

> "There have been several definitions of what constitutes a frivolous application in this context, and I may say that it does not partake of the normal colloquial sense of frivolity as involving light-heartedness or foolish humour."

[15] The key point in his judgment at pages 110 and 111 is that the Magistrates' Court should not be rejecting an application for case stated unless it is hopeless or of an academic nature as set out by Lord Bingham LCJ in the case cited therein. It is true to say that in that case he does say the following:

> "What the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic."

[16] In effect that is the position that Ms Cheshire adopted and she submitted that the application here was misconceived and therefore the judge was entitled to refuse it. While there might have been an arguable case for saying that it is misconceived I do not think it could be described as either hopeless or of an academic nature. I have read out the District Judge's queries; the first one was that the application included facts which were not called for. I do not think that that justified a refusal of the application for case stated. It may be that such an application should have a note of evidence or draft Statement of Facts as an appendix to the application rather than in the body of it. It is clear that counsel in drafting it was seeking to assist the District Judge in recollecting the case accurately and I do not think that aspect of matters could prove fatal in any way.

[17] Her other criticisms strongly put are, in effect, that all she determined was that the prosecution had not satisfied her beyond a reasonable doubt that this was a public place rather than a finding of fact that it was a public place. In part I think that issue is one for a substantive hearing of the case stated but it does not seem to me a mis-statement of a nature that justifies a refusal to state a case. Likewise, the draft question at paragraph 11 of the application to State a Case concentrates on the photographs saying that the locus was private property which was really the only point made on behalf of the defence. The judge is also taking into account the absence of any oral evidence from Asda about that. I do not want to say too much [at this stage]but it seems to me that that is a narrow enough point and even if taken with the other points is not enough to describe the case as hopeless or academic. Ms Cheshire, wisely, when the court was seeking to test her proposition, submitted that errors in the application to state a case could lead to its rejection providing they were fundamental. Without tying myself to that test I certainly conclude that the errors here were not fundamental. I have outlined them in this judgment and it seems to me they are either not errors at all or are of a minor nature. Mr Philip Henry in his reply made the very valid point that neither in her affidavit nor through her counsel today does the Learned District Judge say that she does not understand the point of law. If an application to state a case stated the point of law in a way that was incomprehensible a court may be entitled to refuse to state the case as indicated on the authorities they may be entitled to in wider terms but it is not, in my opinion, sufficient here.

[18] I have considered the Rules under the Magistrates' Court Rules at 158-160. I consider, if anything, they assist the PPS; there is no bar on suggesting facts to the court. On the contrary, by implication it makes it clear that the question sent by the party seeking the case stated is in essence a draft. I say this because the District Judge in this case under the 1981 Order sends her draft to the other parties who can comment on it and he or she may recast it before it is crystallised for the benefit of

the Court of Appeal. It is also, of course, not in dispute that the appellate courts themselves can and do recast questions which have been submitted to them.

[19] Taking into account all the submissions I am satisfied that the Public Prosecution Service here is entitled to succeed. If there are any defects in this application they are modest in nature and they are certainly not such as to render the application either a nullity or void and in the circumstances I grant the order sought in the application before the court.